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In the Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-52 and 79-53

ROBERT Z. NAIFEH,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

LOUIS ABRAHAM, JR.,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY MEMORANDUM OF PETITIONERS, ROBERT Z. NAIFEH AND LOUIS ABRAHAM, JR.

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September, 1979

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The Response of the United States to these petitions for writs of certiorari, although styled a "Brief in Opposition", is, in truth, a statement of reasons why certiorari clearly should be granted to review the bafflingly opaque decision of the Court of Appeals in this case.

1. The United States, in its very gingerly-worded Response, admits that the Court of Appeals "is not entirely

clear" (Brief, p. 3) on the question of whether the Court of Appeals dismissed the instant appeal for want of an appealable order within the meaning of 28 U.S.C. § 1291 or whether the Court of Appeals dismissed the appeal on the ground that petitioners' Double Jeopardy Clause claims were not ripe for appellate review .

We fully agree with the Government that the holding of the Court of Appeals is not only unclear but hopelessly ambiguous on this crucial point. The point is crucial because of the "mandatory and jurisdictional" requirement of Rule 4(b) of the Federal Rules of Appellate Procedure that, in a criminal case, a Notice of Appeal must be filed within ten days of the date of the entry of the judgment or order appealed from or be forever time barred. *United States* v. *Robinson*, 361 U.S. 220, 224, 229 (1960). Indeed, only last Term, this Court, at the Government's urging, has driven this point home with unmistakable clarity. *Helstoski* v. *Meanor*, ... U.S. ....., 99 S.Ct. 2445, 2448 n.4 (1979).

We invite the Court's particular attention to the fact that the United States makes no attempt whatsoever to defend the decision of the Court of Appeals as it is written. The Government, in its very tentatively-worded brief, suggests that the Court of Appeals' opinion did not really *mean* what it plainly appears to *say*, although the United States is unable to avoid agreeing that ". . . it is true that the Court [of Appeals] . . ." quoted from language contained in *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) which clearly demonstrates the Court of Appeals *did mean exactly what it said; said exactly what it meant;* that its holding is the law of the Tenth Circuit; and, we submit, that its

holding clearly should be reviewed by this Court. The Court of Appeals appears to agree. As noted in our petitions, the Court of Appeals took a step virtually unprecedented in Tenth Circuit practice in staying its mandate herein, pending disposition of these petitions for certiorari even though the stay halted any trial on a pending indictment in the District Court. Clearly, we submit, the Court of Appeals would not have taken this extraordinary action if it did not believe the question here presented should be reviewed by this Court.

The Government suggests that another decision could have been written by the Court of Appeals which would have reached a more "reasonable" result, and which would not require "disruptions of trials" with a jury already sworn in order to present double jeopardy claims of the type here at issue (Brief, p. 9). Perhaps so.

But neither counsel for petitioners nor counsel for the Government have the power to instruct a Court of Appeals as to how it is to write its decisions, or what the precedential force of a decision of a Court of Appeals is upon District Courts within the Circuit over which it exercises appellate jurisdiction, and over counsel who must practice within those District Courts. Rather, review of an important appellate decision so clearly unreasonable that even the Government, when it is the prevailing party, is hesitant to defend the decision as it reads, is one of the reasons why this Court sits. And it is the principal reason why writs of certiorari should obviously be granted in this case.

We also invite the Court's particular attention to the fact that *each* point which the Solicitor General suggests

the Court of Appeals, despite its language, did not really mean to reach and decide as it did, is a point which petitioners *expressly* and forcefully presented to the Court of Appeals by way of an elaborate Petition for Rehearing or Clarification.

2. The response of the Court of Appeals to our Petition for Rehearing (or clarification) was to deny the Petition for Rehearing, to "clarify" the judgment to the extent of stating that the appeals were "dismissed" rather than "affirmed", as the judgments had originally read, and to then take the highly unusual step of staying its mandate in these cases pending disposition of petitions for writs of certiorari. As noted, the Court of Appeals stayed its mandate in these cases even though the stay has the effect of preventing trial upon a pending indictment in the District Court. Insofar as we are aware, or insofar as inquiry at the office of the Clerk of the Court of Appeals reveals, such an order appears to be virtually unprecedented in Tenth Circuit practice under such circumstances.

In other words, the Court of Appeals must clearly be understood to have been aware that it was deciding an important and substantial Double Jeopardy Clause question, as well as an important and substantial question involving the proper interpretation of the "final decision" requirement of 28 U.S.C. § 1291, and one which it felt the prior decisions of this Court *compelled*. Otherwise, the stay of the mandate pending certiorari would have been denied. When the Petition for Rehearing (or clarification) is compared to the Court's order disposing of the same entered on June 15, 1979, it is clear that the Court of Appeals *meant* what it said; that the Court of Appeals clearly understood

the *effect* of what it was saying; and that it held as it did, even though an extensive Petition for Rehearing had made the same point the Solicitor General in effect concedes: the decision simply makes no sense.[1] Upon examination of the Government's response Brief, it becomes clear that both the Solicitor General and petitioners are in agreement on one point: no one understands the ultimate disposition which the Court of Appeals has made of the important double jeopardy questions which were presented to it by petitioners' appeals.

> The Government admits that it should be noted
>
> ". . . at the outset that it is not entirely clear whether the court of appeals held the district court's denial of the motion to dismiss was not an appealable order, or whether it assumed the order was appealable and held that petitioner's claim on the merits was not ripe for review." (Brief for the United States, p. 3)

We could not agree more. Our Petition for Rehearing, or for clarification of the judgment, of the Court of Appeals made this same point almost verbatim, observing that

> "It is not clear, at least to us, whether the Court intended its disposition of these appeals to rest upon the nature of the Double Jeopardy Clause claim, or, rather, upon the 'final decision' requirement of 28 U.S.C. § 1291." (Petition for Rehearing, Clarification or Stay of Mandate, p. 5).

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[1] Because of the vital need for clarification which petitioners believed the Court of Appeals' opinion of May 15 created, petitioners sought, and received, special leave of the Court of Appeals to file a joint petition for rehearing or clarification in excess of the page limitation established by the Rules of the Court of Appeals for the Tenth Circuit.

We strongly urged that ". . . this potentially very important point be clarified by the Court." (Petition for Rehearing, p. 6).

The Court of Appeals' response was to amend its judgment to state that the appeal from the District Court's order overruling Appellants' double jeopardy claims was "dismissed" rather than "affirmed" as the opinion had originally held, but to otherwise deny either rehearing or clarification, and to then stay the mandate pending certiorari. *That* is the action of a Court which is firmly convinced *this* Court's decisions require the holding which it reached.

The Government suggests that there is "no reason to extend" the rule of immediate appealability of *Abney* v. *United States*, 431 U.S. 651 (1977), to include the double jeopardy claims presented by petitioners. The implicit assumption is that this case requires an "extension" of the *principles* of *Abney*. This is, we believe, erroneous. The Government reaches its conclusion by stating, in a tone of unexplained self-assurance, that the decision of the Court of Appeals for the Ninth Circuit in *Launius* v. *United States*, 575 F.2d 770, 771 (9th Cir. 1978) does not really mean what it said either. (Brief for the United States, p. 7, n. 4). The question of whether certiorari should be granted in these cases should not be answered on the basis of how the Government psychoanalyzes the Judges of the Courts of Appeals to determine what their opinions "really" meant. *Cf*, *United States* v. *Constantine*, 296 U.S. 287, 298-299 (1935) ("The judgment of the Court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the

statute is destroyed. Thus, the process of the psychoanalysis has spread to unaccustomed fields." Cardozo, J., dissenting).

We are not aware of any theory of law by which counsel for either side may undertake to deny review of a decision hurtful to the opponent by informing the reviewing Court that prevailing counsel has devined that, though the Court below stated one result, it really must have intended another.

Moreover, it should be remembered that the Double Jeopardy Clause issues in this case were orally argued at length before the District Court. The District Court made unmistakably clear its belief that, under *Abney*, a decision adverse to petitioners would be immediately appealable. The Government was represented by able counsel at the hearing conducted by the District Court, including the Chief of the Regional Office of the Antitrust Division of the Department of Justice. At no time did the Government challenge or question in any way Judge Eubanks' clear statement of opinion that his ruling on the double jeopardy question would be immediately appealable.[2]

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[2] The Government's comment that petitioners herein did not seek certification of the District Court's order under 28 U.S.C. § 1292(b) (Brief for the United States, p. 4, n. 3), thus, comes with extraordinary ill grace. As noted in our petitions for certiorari, the District Court was of the opinion that petitioners' double jeopardy claims *were valid* and should be *sustained*. The District Court squarely ruled that, as an original proposition, petitioners would ". . . have *no difficulty . . . persuading me that we have double jeopardy here . . .*" (Transcript, p. 19, lines 23 through p. 20, line 1). The District Judge overruled petitioners' double jeopardy claims *solely* because, as the District Judge noted, a divided panel of the Court of Appeals for the Ninth Circuit had ruled in a manner contrary to his view in *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970) *cert. denied*, 400 U.S. 849, and Judge Eubanks stated, he did not believe it proper for a single District Judge to disagree with a

The Government's belated discovery that the District Court's firm holding that its order was immediately appealable was "erroneous" (Brief, p. 4) is little more than a restatement of the argument contained in the Government's brief in *Abney*, to the effect that a double jeopardy claim, if good, can always be reviewed and corrected on appeal in the event of an unfavorable verdict and becomes moot in the event of a favorable verdict. The argument did not prevail in *Abney* and should not prevail here.

3. The Government argues that the decision of the Court of Appeals "cannot reasonably be read to encourage" disruptions of trials once a jury has been sworn because, although the Court of Appeals *said* this, it did not really *mean* it. Indeed, the Government goes so far as to state that

> "Nothing in the Court of Appeals' opinion implies that petitioners will have a ripe claim, and a right of appeal, if they renew their motions after the jury is sworn and jeopardy attaches in their trial."

This is simply not true.

Petitioners herein *urged and reurged clarification of this vital issue* in their Petition for Rehearing in the Court of Appeals. We argued that the Court of Appeals should

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[2] (Continued)

panel — even a divided panel — of a Court of Appeals. It is apparent from the circumstances, that, had the Government expressed the *slightest* question as to appealability, Judge Eubanks would have seriously considered a certification order under 28 U.S.C. § 1292(b) because, in his opinion, *Western Laundry* was wrongly decided. The Government's implicit suggestion that counsel for petitioners should have sought certification under the circumstances above described is, thus, singularly inappropriate. Neither the final decision requirement of 28 U.S.C. § 1291, nor the certification provision of 28 U.S.C. 1292(b) is intended to function as a trap which the Government may spring by studied silence in the District Court.

not impose a requirement upon defense counsel or the District Courts

> ". . . that the defendant be required to follow the highly disruptive course of waiting for a jury to be formally sworn before presenting his double jeopardy claim to the District Court and, under the holding of *Abney* v. *United States*, to this Court, [that is, the Court of Appeals] in the event the District Court overrules the motion to dismiss." (Petition for Rehearing, p. 6).

Petitioners emphasized, as strongly as language will allow, that the opinion of the Court of Appeals placed counsel for petitioners in a position of

> "grave practical tension . . . between [counsels'] professional and ethical obligations to their respective clients on the one hand and their professional and ethical obligations to the trial court on the other." (Petition for Rehearing, p. 2).

Petitioners pleaded at length with the Court of Appeals to *clarify or reconsider* its opinion in order to *avoid* a situation in which

> *"counsel for Mr. Naifeh and Mr. Abraham would have a professional duty to their respective clients to immediately appeal to this Court in the event the District Court denied the motions to dismiss, thereby disrupting the trial with a jury already empaneled. Moreover, counsel for the defense would be required to do so knowing in advance that the empaneling of the jury was a mere formality which would be the trigger for renewal of the motions to dismiss on double jeopardy grounds and an appeal in the event the motions were denied."* (Petition for Rehearing, p. 15) (emphasis in original).

Counsel for petitioners argued at length that, under the opinion of the Court of Appeals, if we did *not* disrupt the proceedings in the District Court immediately upon empanelment of the jury and did *not* file a Notice of Appeal from the District Court's ruling within ten days, the Court of Appeals would have

> "no jurisdiction to hear the appeal presenting the double jeopardy issues since timely filing of a Notice of Appeal from a final decision of the District Court is 'mandatory and jurisdictional', *United States* v. *Robinson*, 361 U.S. 220, 224 (1960) and, thus, the right of Mr. Naifeh and Mr. Abraham to consideration of the constitutional questions presented here on the merits would be forever foregone . . ." (Petition for Rehearing, p. 16).

Lastly, counsel for petitioners urged the Court of Appeals,

> ". . . in the interest of the orderly administration of justice, [to] indicate to counsel and the trial court the procedure which is to be followed on remand *to protect* Mr. Naifeh's and Mr. Abraham's *right to appellate review of the question presented in light of the time limitations for appeal from a 'final decision' of the District Court.*" (Petition for Rehearing, p. 20).

We reiterate that the Court of Appeals denied petitioners' motion for rehearing or clarification of its decision, but amended its judgment and stayed its mandate pending certiorari.

In other words, the Court of Appeals must be understood to have clearly and unequivocally held, contrary to the Government's suggestion, that as the Court of Appeals reads this Court's decisions, petitioners *must* reassert their

double jeopardy claims as soon as a jury is empaneled and sworn in the District Court and, in the event the District Court overrules the motion to dismiss, *must* immediately appeal to the Court of Appeals within the 10-day jurisdictional time limit of Rule 4(b) of the Federal Rules of Appellate Procedure or never receive appellate review of the question at all. *See, Helstoski* v. *Meanor*, ... U.S. ....., 99 S.Ct. 2445, 2449 n. 4; *Id.* at 2449-2450 (Brennan, J., dissenting from denial of issuance of a writ of mandamus).

In light of the issues presented, in strong terms, in our Petition for Rehearing, clarification or stay of the mandates pending certiorari, the only rational conclusion to be drawn from the Court of Appeals' order denying rehearing but staying the mandates is that the Court of Appeals meant exactly what it said.

We are in accord with the Government's apparent agreement that such an unseemly and disruptive procedure should not be required in every District Court in the Tenth Circuit. For that very reason, certiorari should be granted, the jurisdictional dismissals entered by the Court of Appeals should be vacated and the causes should either be decided on their merits or be remanded to the Court of Appeals with instructions to decide the double jeopardy claims presented herein on the merits.

4. On the merits, the Government's blasé assumption that the Double Jeopardy Clause claims are of doubtful validity is without foundation. As noted, the District Court was clearly of the view that, as an original question, it would have *sustained* the motions on the ground the in-

dictment shows on its face it offends the Double Jeopardy Clause.

Only the District Judge's belief it would be improper for a single District Judge to so hold in view of the contrary opinion of the Ninth Circuit in *Western Laundry* prevented such an order from being entered, a fact clearly shown, we believe, by the transcript of the hearing. The District Court's belief was, we submit, correct. Indeed, the Government itself has made a closely analogous argument, and prevailed, before a distinguished panel of Circuit Judges sitting on the Court of Emergency Appeals in *Rosenzweig* v. *General Services Administration*, 299 F.2d 22, 27-29 (Em.App. 1962) *cert. denied*, 369 U.S. 818.

The Government's casual statement that one sentence of *dictum* in the opinion for a bare majority of the deeply divided Court in *United States* v. *A &P Trucking Co.*, 358 U.S. 121, 127 (1958) (Brief, p. 6, n. 4) disposes of the Double Jeopardy Clause claims here at issue, is contrary to the Government's own argument in *Rosenzweig, see*, 299 F.2d at 29, that A & P should be limited to the statute — the Motor Carrier Act — ". . . involved in that case . . ." and, moreover, the Government's assumption has been subjected to a sharp critique by Judge Hufstedler, in her separate opinion in *Western Laundry & Linen Rental Co.*, 424 F.2d at 445 (9th Cir. 1970). We submit Judge Hufstedler's, and Judge Eubanks', views are correct on the merits. There is, thus, a powerful argument that petitioners' claim that the instant indictment offends the Double Jeopardy Clause is well taken. The issue should either be decided by this Court or, alternatively, remanded to the Court of Appeals for an initial decision on the merits.

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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September, 1979

CERTIFICATE OF SERVICE

This is to certify that the undersigned has mailed three (3) copies of the foregoing Reply Memorandum of Petitioners, Robert Z. Naifeh and Louis Abraham, Jr., in conformity with Rule 33 of the Supreme Court Rules to:

Honorable Wade H. McCree, Solicitor General
Office of the Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

this ..... day of ....., 1979, with postage fully prepaid thereon.

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